

SOUTH AFRICA / JUDGMENT

Ruck v Makana Municipality and Others (2628/2010) [2010]

ZAECGHC 111 (24 November 2010)

[2010] ZAECGHC 111

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Mageza

CASE / FILE NUMBER

2628/2010

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IN THE HIGH COURT OF SOUTH
AFRICA
(EASTERN CAPE, GRAHAMSTOWN)
Case no: 2628/2010

In the matter between:

PRUDENCE JANE RUCK
.....Applicant
and
MAKANA MUNICIPALITY
.....First
Respondent
SYDNEY WILLIAM FITZHENRY N.O
.....Second
Respondent
PENELOPE LYNNE FITZHENRY N.O
.....Third Respondent
HAROLD RICHARD GLENNIE N.O
.....Fourth
Respondent

JUDGEMENT

MAGEZA AJ,

[1] This application came before me by way of urgency for the review, in terms of section 6(2)(e) (iii) of the Promotion of Administrative Justice Act (PAJA), and the setting aside of the decision of the First Respondent in approving building plans submitted to it by the Second to Fourth Respondents as Trustees of the Karoo Vlake Trust (land owner) and which building plans, First Respondent approved on the 24th May 2010. Applicant also seeks, in the event the review succeeds and the First Respondent's decision is set aside, an Interdict preventing the continuation of the building works by Second to Fourth Respondents pending the submission and approval of new and altered plans if any.

[2] Applicant is the registered owner of erf 2190 Makana Municipality (Grahamstown) and her property is also known as 2 Worcester Street.

[3] First Respondent is the Makana Municipality, a local municipality

established in terms of the Local Government: Municipal Structures Act 117 of 1998.

[4] Second, Third and Fourth Respondents are cited in their capacity as trustees of the KAROO VLAKE TRUST, owner of erf 9455 on whose property the 3 (three) storey block of flats development flowing from the impugned building plans, is currently under construction. Erf 9455 is in itself, a consolidation of two previously free standing erven and these erven are also known as numbers 4 and 6 Worcester Street.

[5] Applicant's property (erf

2190) adjoins erf 9455 and Applicant

asserts that the impugned development directly affects her rights to her own property and that she thus has a direct interest in the development concerned.

[6] The second reason on which her interest is founded arises from

the fact that between the two properties is a public street, at times referred to in the papers by the parties as a 'passage way', measuring some 2.52 metres in width and this public street serves as a thoroughfare for the public to walk from Worcester Street to the rear of both erven where Holland Street is situate on the northern side. This strip of land has its origins in a subdivision of her property granted by her predecessors in title in favour of the Municipality and a servitude was, as a result, registered over that portion in favour of the First Respondent. Applicant is in possession of legal and professional advice as well as two letters from the Surveyor General confirming this fact. Based on these, attempts to have the servitude in favour of the Municipality removed as a restriction over her rights of ownership and the property reincorporated back into erf 2190 have been put in train by Applicant. To this end, an application for its re-incorporation

has been submitted to First respondent and is awaiting the respondent's consideration and decision.

BACKGROUND

[7] Applicant first became aware of the mooted development as early as August 2009 and states in her papers that she first sought to establish the precise nature of the development by seeking access to the building plans but was at all material times and instances rebuffed and denied such access by both the First and Second to Fourth Respondents.

A succinct history of the efforts at access are set out in the supporting affidavit of her legal advisor, Grant Barrow.

Briefly that past is as follows:

On the 3rd December 2009 Applicant's attorneys advised

First Respondent that Applicant contests the ownership of the portion of land forming the public street and had been advised by a Land Surveyor, one Peter Sulter, and by architects, that the Surveyor General had by way of two letters (in 2001 and in 2008) confirmed that the right of ownership to the said portion vests in her and that there exists a registered servitude over the same in

favour of the First Respondent. She requested that in light thereof, First Respondent was required to provide her with "an opportunity to satisfy ourselves that any plans that are finally approved have taken the above circumstances into account. We further require sufficient time to object to any plans lodged and request that you ensure that our offices are advised should any plans be submitted".

As at 12 January 2010, no response had been

forthcoming and so Applicant's attorneys wrote to First respondent requesting a reply. On the 29th January they were advised by one Ms Ponoshe, First Respondents building inspector, that the building control officer was on leave until the 1st February at which stage First Respondent "will provide any documents you need concerning this matter immediately when the BCO (building control officer) is back as he is the one who is sitting with the Aesthetic Committee" (my underlining). These documents were never provided.

Nothing happened until 17th March when Second to Fourth

Respondents' attorneys requested a meeting and wrote a

letter stating, inter alia, that "... (2) We have artists'

impressions, plans, and various letters that we wish to

furnish and discuss with your clients (my underlining).

- (3) Our instructions are to resolve this matter amicably and to discuss various proposals which we would like to do

sooner rather than later...” The meeting was held at the Highlander on the 22 March 2010 but ended without resolution as the Second to Fourth Respondents refused to furnish them with copies of the plans as per their letter referred to herein. In addition, Respondents’ attorneys could, on request, not provide the measurements relating to the height of the proposed building nor the rear building line setback.

From then on, no discernible progress was made even though further letters were dispatched to First Respondent and Second to Fourth Respondents.

On the 27th May 2010, Applicant’s attorneys managed to get hold of one Clive Christian (the building control officer), who informed them that the plans had in fact been approved the day before, ie, the 26th May (in fact 24th May). Christian informed the attorneys that the only way to inspect the plans would be with permission of the owner.

The request was directed to the Second to Fourth Respondents who, by letter dated 3 June 2010, declined access to the plans.

[8] It appears that after the 24th May, in tandem with these refusals

for access to the plans and information regarding the height and building line dimensions, Second to Fourth Respondents commenced construction of the development with Applicant practically unable to gain any knowledge of what the detail and dimensions of the plan were, and how they impacted on her foregoing concerns. She further states that Second to Fourth Respondent refused her any access into their property whilst the construction was under way.

[9] On the 17th September 2010, Christian visited the building site to, among others, measure the side building line. It appears that Mrs Turner (Applicant’s neighbour) was at home and was able to access the property and spoke to Christian who informed her that the side building line from the footprint of the building to the boundary wall on the public street side was 3.7metres. Applicant then became possessed of this new information for the first time and conveyed it to her attorneys who wrote to Second to Fourth Respondents raising the issue as a zoning transgression. Pursuant to this letter, a Mr Mark Ford, the appointed contractor performing the building works, invited Applicant’s legal advisors to inspect the side building line and the said inspection took place on the 23 September 2010. According to Applicant, the following facts, among others, were established from this inspection:

The true lateral building line was 4.2metres;

The plan provided for three storeys;

Each storey was 2.85metres.

In calculating the adequacy of the 4.2metre building line, no allowance had been made for the roof of the building;

From the floor of the ground floor to the top of the structure on which the roof was to be erected was a height of about 8.55metres. This required a side building line of 4.275metres;

That the height of the building, excluding the basement or lowest floor, was 11,378metres. This was the measurement from the floor of the ground floor to the top of the roof. This would have then required a side building line of 5.689metres and not 4.275metres.

That it was apparent from the foregoing, First respondent, in approving the plans, had not taken into account the height of the building inclusive of the roof.

FIRST RESPONDENT'S ANSWER.

[10] In summary these can be encapsulated as follows:

First Respondent is represented in these proceedings by Clive Christian, the building control officer, who confirms that the plans were approved by the First Respondent on the 24th May 2010. He posits that;

there exists a public street between the Applicant and

Second to Fourth Respondent's properties and the public street is 'created by a servitude over erf 2190' and is registered in favour of the Municipality.

He 'submits' that the side building line falls to be measured from the eastern side of the public street, ie., the boundary of erf 2190 with such public street. This, he states, appears from the definition of "land unit" in the Land Use Planning Ordinance No.15 of 1985 which includes "...a portion of land...capable of being registered in a deeds registry and may include a servitude or lease;"

He furthermore states that even measuring the side building line from the footprint of the building to its

boundary wall with the public street, it allows more than

sufficient space to comply with the required side building

line stipulated for in the Zoning Scheme Regulations

ie 4 metres or half of building height.

He confirms that the Municipality had received an application from the Applicant for closure of this public street and for the ownership thereof to revert to the applicant. However no decision had yet been taken in connection with the said application.

[11] He then goes on to say, in his opinion, (and this appears to me to be the crux of the dispute between the litigants) that;

the permissible height allowed in terms of Regulation

3.4.2 is defined in terms of 'storeys', which exclude the

basement and roof (my underlining);
he measured the distance from the wall on the
Applicant's boundary to the building under construction
on erf 9303/9455 with a tape measure to be 6,73 m.
This meant that the distance from the boundary of erf
9303/9455 to the building under construction was 4, 21
metres;
the approved height of the building for the purpose of
Regulation 3.4.2 of the Zoning Scheme Regulations
(read with the definition of "storey"), is 8,16 m. Half of
this height is 4, 08 m.
Furthermore that the approved building line of 4,2m
exceeds this distance. Even measuring the side building
line from the boundary of erf 9303/9455 exceeds 4,08m
and, according to his measurements, it was 4, 21m.

SECOND TO FOURTH RESPONDENT

[12] Second to Fourth Respondents make common cause with the

First Respondent in submitting that the proper approach is to have regard to the measurements from the footprint of the impugned building to its boundary, and then to add the width of the public street. This submission in Counsel's heads of argument is articulated as a submission that the Court should accept that "the passageway's width is 2520mm and the distance between the pegged boundary to the buildings is a further 4450mm, making a total of 6970mm". On this construction, Counsel submits that the building could even be as high as 13940mm.

[13] In argument, the emphasis on behalf of Second to Fourth

Respondents was, in addition, that even were it to be found that there is a technical contravention, such is so minimal that the Court should disregard it in light of the overall development. In my understanding this was a *de minimis non curat lex* argument.

[14] A further defence suggested by the Second to Fourth respondents was that their predecessors in title had acquired the portion constituting the pathway/public street by acquisitive prescription and had possessed it continuously for 30 years *nec vi, nec clam, nec precario*. This argument was not pursued with any particular vigour possibly in light of the fact that First Respondent accepts that the Municipality

enjoys a servitude over that portion and that same appears historically to have formed part of the Applicant's property.

[15] The crisp issue this Court is asked to make a finding on is whether, in determining the height of a building for purposes of the Grahamstown Zoning Scheme Regulations, the roof portion of the structure is to be taken into account or not. In the applicants view it had to be considered. In the Respondents view, only the 'storey' height is relevant.

Mr Paterson, pointed out at the commencement of his argument that Applicant's attack on the First Respondent's approval of the plans is levelled against its failure to take into account the roof height in the overall assessment of the total height of the building. Indeed, this concession was made by First Respondent and the failure, according to it, of not taking the roof into account was based on this that the Regulations did not require it to do so. Put another way, all that the Regulations required it to do was have regard to only the height of each story to the exclusion of the roof.

URGENCY

[16] I have already set out the background relating to the efforts of the Applicant in seeking the attention of and, appropriate responses from, the First Respondent in particular and the developer in an attempt to have access to the plan in order to assess whether the same would have any impact on her own application for the reconsolidation of the public street portion over the municipality has a, servitude back into her erf or not. In addition, whilst the law does not necessarily give neighbours the right of unfettered access and consultation to planning and related processes, there appears to me to be nothing in the law that allows a Municipal official to act with antipathy towards a potentially affected property owner. In some instances, all that is required by neighbouring owners is to establish the base new features of the intended development.

[17] Twice the First Respondent and the Second to Fourth respondents promised to furnish the requested information and then defaulted on their undertakings without so much as an explanation. Applicant came to be possessed of information enabling her to approach this Court only pursuant to the site visit made by the building control officer on the 17 September and the inspection of the 23 September 2010. That information painted a prima facie basis to conclude that the plans may have been approved without regard to the Municipality's own zoning regulations that it is obligated to protect and enforce.

[18] Far from inclining to the view expressed by the Respondents that Applicant was tardy and had created her own urgency by delaying the earlier institution of legal proceedings, I am persuaded that Applicant explained her inability to approach this Court earlier for an interim interdict pending this review application. The explanation for the urgency following Applicant's coming into possession of the information on the 17th and 23rd September is plausible.

PURPOSE OF ZONING LAWS

[20] Courts are called upon daily to deliberate over disputes of neighbouring property owners inter se, and at times between property owners and local Municipalities. Often, what the property owner wants to introduce does not necessarily co-incide with what the law contemplates and that which the Municipal officials are called upon to regulate in the interests of the broader public. On the other hand, whilst it is so that the right to security and enjoyment of property rights is sacrosanct, at times this right does clash with what is in the broader public interest, that is, continuing development and associated investment leading to better economic development. In order to manage the tension between the “push and pull” inherent in this clash, laws are in existence to regulate the manner in which this is to be managed. The purpose of the law is to lay the foundation for uniform, orderly and harmonious development and growth. This then in turn promotes certainty which is crucial in informing, among others, the content of the right of ownership.

[21] Central to the management of zoning is the crucial role played by the local Municipal officers as guardians of the zoning laws.

In *Odendaal v Eastern Metropolitan Local Council*¹ Lewis AJ said the following;

“... both the Act and the Scheme are legislative instruments for ensuring the harmonious, safe and efficient development of urban areas...”

Local authorities are given considerable powers under both Act and Scheme. Onerous duties are imposed on them by both instruments. The essential purpose of the powers afforded and the duties imposed is to ensure that the objectives of the legislative instruments are achieved; that there is a balance of interests within a geographical community. The local authorities are in effect the guardians of the community interest. They are entrusted with ensuring that areas are developed in as efficient, safe and aesthetically pleasing way as possible. They are required to safeguard the interests of property owners in the areas of their jurisdiction...”

[22] Jafta AJ (as he then was) in *Walele v City of Cape Town and Others*² put this as follows:

“At common law, property owners have full rights (dominium) to determine the manner in which their property is used. But these rights have for practical purposes never been unfettered. They have been limited by the common law and legislation to ensure that land ownership is regulated in a manner that is in the interest of all. In congested urban spaces, this need for regulation is particularly acute. Zoning or town-planning schemes are one of the key ways in which the rights of property owners are limited. They often provide for the maximum height of buildings in an area. They also often limit where a building may be built on an erf and the use to which properties may be put in urban areas. These are limitations to the right of ownership.”

[23] Returning to the dispute between the parties, it is necessary to restate that the principal legislation governing urban development in South Africa is the National Building Regulations and Building Standards Act No. 103 of 1977.

The preamble outlines that the Act is intended;
'to provide for the promotion of uniformity in the law relating to
the erection of buildings in the areas of jurisdiction of local
authorities; for the prescribing of building standards; and for
matters connected therewith.'

[24] Section 1 of the enabling Act clearly provides that;

"building"

includes –

any other structure, whether of a temporary or permanent nature and irrespective of the
materials used in the erection thereof, erected or used for or in connection with -

(i) the accommodation or convenience of human
beings or animals;

...

any wall, swimming bath, swimming pool, reservoir or bridge or any structure connected
therewith;

any part of a building, including a building as defined in paragraph (a) (b) or (c)"

[25] The ordinary reading of this definition suggests that it was, at the time of enacting the
statute, the intention of the Legislature that the word "building" be read to incorporate not
only the outer wall structural frame but "any other structure, temporary or otherwise...
erected for the use of human beings". These are other structures that of necessity attach to
the structural walls including in addition, "any wall, swimming bath, swimming pool,
reservoir, bridge or any other structure connected therewith..."

[26] Furthermore, the ordinary meaning of 'building' is set out in the "Concise Oxford English
Dictionary – (Eleventh Edition)" at Page 183 as follows; "a structure with a roof and walls".

[27] The Grahamstown Zoning Scheme consists in Regulations which fall under this principal
Act. The relevant parts of the zoning scheme pertinent to the dispute are the following:

"Regulation 3.4.2

Land use restrictions:

Floor factor: at most 1,0

Coverage: at most 40%

Height: at most three storeys

No building or any portion thereof except boundary walls and fences shall be erected on a site within the following building line restrictions:

Street building line: at least 8m

Side building line: at least 4m or half the height of the building, whichever is the greater, (my underlining) subject to

Regulation 3.4.3 (a)

Rear building line: 4,5m

Parking: 1,25 parking bays per flat, of which 25% shall be clearly demarcated and properly indicated by means of a notice board to the satisfaction of the Council for the exclusive use of visitors (refer Regulation 4.12.1)."

The Regulation states that the side building line is to be determined as a minimum of 4 metres or half the height of the building (depending on which is greater).

[28] Now, It must follow that where words which are defined in the Act occur in the Regulations, they must be given the meaning assigned to them by the Act unless the context indicates the contrary. See - AM Moola Group Ltd and Others v Commissioner, South African Revenue Service and Others³

[29] In *Baron & Jester v Eastern Metropolitan Local Council*⁴, *Fevrier AJ* in interpreting words in a Regulation referred to the rule that in a literal construction, the ordinary meaning of words is regarded as the primary index to the "intention" of the Legislature. (paragraph 18 of the judgement). He however acknowledges that there are many instances where such interpretation can lead to a "glaring absurdity" – see *Kellaway – Principles of Legal Interpretation of Statutes, Contracts and Wills*

(1955) at 49.

Once this is the case, the "golden rule" requires that if the literal meaning creates an absurdity, which cannot be accepted, the intention of the lawmaker is to be ascertained.

[30] *Innes CJ* in *Union Government v Tonkin*⁵, went on to say;

“Intention... must clearly appear, either from the language used, or from the nature of the enactment... We are not, in ascertaining the intention of the Legislature, restricted to the language of the enactment, but may look at the surrounding circumstances, and may consider its objects, its mischief, and its consequences.”

[31] In *Dadoo Ltd and Others v Krugersdorp Municipal Council*⁶, Solomon JA stated that *prima facie*, the intention of the Legislature is to be deduced from the words which it has used. Referring to the “elasticity which is inherent in language” the learned Judge indicated that it is permissible for a Court in construing a statute, to have regard not only to the language thereof but also to the object and policy as gathered from a comparison of its several parts, as well as from the history of the law and the circumstances applicable to its subject matter.

[32] Finally, in *Scholtz v Rosewall*⁷ the Court held, per Ntshangase J, as follows:

“Mr de Jager also contends that any overhang of the roof is regarded as an ‘aerial encroachment’ which is as such not regarded as an encroachment because it does not interfere with access. In this regard, I find that such an interpretation of the provisions of the Scheme would be self-defeating and could not have been intended for the logical reason to be found in the observation of Mr PM Zietsman, the second respondent’s (Municipality) contracted planning consultant who stated that: ‘... coverage of a building must include the roof overhangs simply because if the contrary is applied it will make a mockery of the application of building lines as well as side and rear space requirements.’ Clearly no component which constitutes the roof as designed can at the same time be capable of a separate existence which is distinct from such roof. Once the roof itself is acknowledged to be an integral part of a building as indeed it does become, it cannot be capable of a separate existence from the building. Any prohibited encroachment of a building would therefore refer to such building with its roof as defined in Clause 1.2 as an entity.”

[33] According to the measurements on the plan, the position is

that the height of the building inclusive of the roof is 11.538 metres. This measurement is common cause between the parties.

Regulation 3.4.2, states clearly that the side building line must be, “4 metres or half the height of the building whichever is the greater”. The use of the conjunctive ‘or’ in the context of the Regulation means therefore that where the height of the building (inclusive of the roof) is in excess of 8 metres, the side building line must then be determined on the basis of half the height of such ‘building’. First Respondent in determining height should only have had regard to the foregoing and not a strained view that height is to be determined in terms of a storey. A storey often varies in height from building to building and its measurement is influenced by the design and utility or purpose of a building. The regulation contemplates a side building line which is “half the height of the building” and the ordinary definition of a building includes a structure with a roof. Indeed to suggest otherwise would make the regulations difficult to enforce as the First Respondent’s misplaced view might lead to buildings with variable heights populating a neighbourhood to the detriment of the uniform and orderly development contemplated in the Act.

[34] When one has regard to the plans approved on the 24th May

2010, the proposed side building line is clearly 4.5metres. This measurement is a distance from the building footprint to the boundary wall of erf 9455 and not erf 2190. The approval was based on those dimensions and not dimensions inclusive of the public street. Indeed it was not argued before me that the width of the public street was in fact taken into account when assessing the plans prior to making the decision. That was not what First Respondent was asked to approve by the Second to Fourth Respondents. The introduction of this new ground of premising compliance after approving the plans is cause for concern. The introduction of this defence could only have been thought of after the plans had been approved and then only once the applicant became more and more belligerent and commenced these proceedings. It is to my mind an ex post facto reconstruction of the detail in order to try and repel a cogent attack of the First Respondent's impugned approval. It is in fact a defence which is to my mind irrelevant to the extent that the said consideration did not form part of the May 24th approval.

[35] On the basis on which the building plan is configured, First Respondent could not have validly approved the same as the side building line fell short of the required statutory minimum.

[36] Administrators have a duty to act lawfully and uphold the law. Their actions, in the interests of the public good, must be motivated by lawful compliance, good faith and rational decision making. To the extent that public power is exercised in this way, Courts will "defer to government at the margins without relinquishing its supervisory role completely" – see Cora Hoexter 'The Future of Judicial Review in South African Administrative Law'8.

[37] Judicial review is essential in administrative law and the principle of legality requires that an invalid administrative decision be set aside. – see Eskom Holdings Ltd v The New Reclamation Group9

[38] The building control officer has a duty to ensure that the local authority, in the interests of uniform, procedural and managed development in accordance with law, will adhere to the prescript of the zoning regulations of which he is part custodian.

[39] The depth of this informed decision making process is highlighted as follows by Heher JA in True Motives 84 (Pty) Ltd v Madhi and Another (Ethekwini Municipality as amicus curiae)10

"The building control officer for which the Act provides is a man likely to possess professional and practical experience in one at least of the civil engineering, structural engineering, architecture, building management, building science, building surveying or quantity surveying. He will also have access to advice in relation to by-laws and town-planning legislation applicable within his local authority area. The primary facts of the proposed erection will be apparent from the documents submitted to under section 4, and, if they are not, he will seek clarification in writing, by discussion with the applicant or his representative or on the ground by physical inspection..."

[39] Finally, finding of this Court raises the question whether, in light of the order herein, the Second to Fourth Respondents should be interdicted from any further construction. Applicant concedes that such an order may be redundant and furthermore does not address in its papers how far the current structure has proceeded save to say construction has been continuing despite the present proceedings before Court. It may well be that the said structure is close to imminent completion. Aside from the responsibility of the First Respondent to order the cessation of further construction of illegal structures and where necessary, their demolition, there exist in the law penalties for each day such structure remains standing in defiance of the law.

[40] In the result I make the following order:

The decision of First respondent in approving the plans submitted to it in respect of the development of Erf 9455 by Second to Fourth respondents herein is declared invalid and is hereby set aside.

Respondents are to pay Applicant's costs including costs of 21 November, jointly and severally, the one paying the other to be absolved.

MAGEZA AJ

24 NOVEMBER 2010

APPLICANT ATTORNEYS WHITESIDES

APPLICANTS COUNSEL ADV PATERSON SC

FIRST RESPONDENTS ATTORNEYS NETTLETONS

FIRST RESPONDENTS COUNSEL ADV EUIJEN SC

SECOND TO FOURTH ATTORNEYS NETTLETONS

SECOND TO FOURTH COUNSEL ADV BUCHANAN SC

(WITH) ADV BOSWELL

1 [1999] CLR 77 (w) at 84-84.

22 2008(6) SA 129 (CC) at par.130

3 2003

(6) SA 244 (SCA).

4 2002

(2) SA 248 (W)

5 1918 AD 533 at 541

6 1920 AD 530 at 554

7[2008] JDR 1353 (N) at par.30.

8 (2000) 117 SALJ 484 at 507

9 2009

(8) BCLR 813 (SCA) at 817 E.

10 2009

(7) BCLR 712 (SCA) at 724 G – H

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Prepared on 13 October 2026 · Esheria